

89-128

Supreme Court, U.S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

LUCRETIA M. ADAMS,

Petitioner,

v.

OTIS R. BOWEN, Secretary of
Health and Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

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7000



QUESTION PRESENTED FOR REVIEW

Whether the Secretary of Health and Human Services properly determined that Petitioner does not qualify for disability benefits for blindness where Petitioner's neurological processing of visual information leaves her functionally blind, but her measured visual acuity falls outside the definition of statutory blindness.

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Petitioner respectfully prays that a writ
of certiorari issue to review the decision
of the United States Court of Appeals for
the Ninth Circuit entered April 19, 1989.

OPINIONS BELOW

The Court of Appeals for the Ninth Circuit affirmed the decision of the United States District Court for the District of Oregon which had affirmed the decision of the Secretary of Health and Human Services denying Petitioner disability benefits based on blindness. The Ninth Circuit Court of Appeals' decision is reported at 872 F2d 926 (9th Cir. 1989). The District Court decision is reported at 683 F. Supp. 231 (D. Or. 1988). The Secretary's decision is unreported.

JURISDICTION

The Ninth Circuit Court of Appeals' decision was entered April 19, 1989. This Court has jurisdiction under 28 U.S.C. Section 1254. This petition is timely, being filed within ninety days of the entry of judgment below. 28 U.S.C. Section

2101(c).

STATUTE AND REGULATIONS INVOLVED

The Social Security Act defines blindness as:

Central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees shall be considered for purposes of this paragraph as having a central visual acuity of 20/200 or less.

42 U.S.C. 416(i)(1)(B). The Secretary's regulation implementing the statutory definition is as follows:

We will consider you blind under the law for a period of disability and for payment of disability insurance benefits if we determine that you are statutorily blind. Statutory blindness is defined in the law as central visual acuity of 20/200 or less in the better eye with the use of correcting lens. An eye which has a limitation in the field of vision so that the widest diameter of the visual field subtends an angle no greater than 20 degrees is

considered to have a central visual acuity of 20/200 or less...

20 CFR Section 404.1581.

STATEMENT OF THE CASE

Petitioner suffered a heart attack in December, 1980. R 90.¹ She underwent coronary bypass surgery in February, 1981. R 99. During surgery, she suffered a stroke which left her partially paralyzed and totally blind. R 112-13.

Because of her work history, Petitioner has 32 calendar quarters of coverage under the Social Security Act since 1980 and is, therefore, considered "fully" insured. 20 CFR Section 404.132 (1988). However, Petitioner does not have 20 calendar quarters of coverage in the 40 quarter

¹ "R" refers to the page of the bound record of proceedings before the secretary in this case.

period ending with the beginning of her disability, thus, she is not "specially" insured. 20 CFR Section 404.130. Because she is "fully" but not "specially" insured, Petitioner must be disabled by blindness to be entitled to benefits. 20 CFR Section 404.130(e). The statute defines blindness as "central visual acuity of 20/200 or less in the better eye with the use of a correcting lens" or a visual field limitation to a diameter no wider than 20 degrees. 42 USC Section 416(i)(1)(B).

Petitioner is no longer totally blind. The visual capacity of her eyes alone can be corrected to 20/50 in each eye. R 165. However, Petitioner is "visually disfunctional" (R 12) because of her anoxic encephalopathy. Because of the effects of this neurological impairment on her vision, Petitioner cannot see sufficiently well to

put a staple in the corner of a piece of paper. Trial Court Opinion at 3; R 157. She trips and falls because she cannot see the ground ahead of her as she walks. Trial Court Opinion at 3; R 176. She avoids brick sidewalks and escalators because she becomes nauseous when she encounters them. Id.

Petitioner's treating doctor and consulting examiners agree she is "functionally blind" because of her neurological inability to process visual information:

Even though her visual acuity is relatively good (20/50) in both eyes, she is functionally blind because of this impairment of central processing of visual information.

R 167 (Dr. Smith).

Suffice it to say that I do not believe that she strictly meets the current definition of legal blindness [20/200 or worse], though I believe she is functionally legally blind on the basis of bilateral visual association area

involvement from her previous
bilateral parieto-occipital
infarcts.

R 181 (Dr. Shults).

However, I believe that this woman has significant cognitive deficits because of the visual association area involvement in the brain which render her functionally legally blind if not legally blind according to a strict reading of the law.

R 185 (Dr. Shults).

Petitioner's claim for disability benefits was denied by the Secretary initially and on reconsideration. Petitioner requested a hearing before an Administrative Law Judge (ALJ) of the Social Security Administration.

After hearing, the ALJ found Petitioner to have an "impairment of central processing of visual information which leaves her functionally blind." R 11. However, because Petitioner's blindness is due in part to a neurological disorder which

affects the processing of visual information, and Petitioner's eyes alone do not meet the specific statutory language defining blindness, the ALJ found Petitioner did not meet the definition of "blindness" under the statute or regulations.

On affirmance by the Appeals Council, the ALJ's decision became the decision of the Secretary. Petitioner requested judicial review, and the trial court found the facts stated above to be undisputed but affirmed the Secretary based on a narrow reading of the statute. The court of appeals affirmed.

TRIAL COURT JURISDICTION

The trial court had jurisdiction over this judicial review proceeding under 42 U.S.C. Section 405(g).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an

important question of Federal Law which has not been, but should be, settled by this Court.

The proper construction of the social security standard for disability based on blindness is, is as the court of appeals recognized, a question of first impression.²

² The only case before Adams of which Plaintiff is aware construing the social security definition of blindness is Gould v. Heckler, 1986 CCH Unemployment Insurance Reports ¶ 16,703 (N.D. Ill. 1985). Plaintiff's decedent in Gould suffered from multiple sclerosis. While his better eye had visual acuity measured as high as 20/30, the damage suffered to his central nervous system caused his treating doctor to find that:

Despite the fact that the patient can see to a degree that he would not be blind if his was purely retinal disease, the associated nervous system abnormality makes him functionally disabled.

* * *

The difficulty here is the use of visual acuity. Visual acuity may be a good test in patients with retinal or eye disease. It is not a terribly good test in people with neurological disease. [Plaintiff's]

The statute sets out a numerical standard. The Secretary's regulations simply repeat the statutory language. Compare 42 U.S.C. Section 416(i)(1)(B) with 20 CFR Section 404.1581. The Secretary has referred to no decisions of any court construing the

problem was in multiple levels including the retina, the optic nerve and the brain, and he had a good deal of nystagmus, so his visual acuity was complicated. He could not read, had difficulty feeding himself, and had difficulty finding his way about in his environment because of problems in all levels. Though these are hard to quantitate with a number, they would in my estimate mean that he was functionally blind.

Id. at 2299-52. Considering this and other evidence, including evidence that plaintiff was unable to complete visual field testing because of the deterioration of his central nervous system, the court in Gould reversed the Secretary's strict application of the statutory visual acuity standard. The court held the Secretary's regulations must be interpreted to mean that a claimant meets the definition of blindness if he or she "suffers from a condition that meets or equals the criteria of Section 404.1581." Id., at 2299-55.

statute or the regulations.

The evidence is undisputed that the Petitioner's ability to see is at least as bad as the visual acuity described in the statute and regulations. However, Petitioner's visual acuity alone does not meet the statutory standard. The question is, therefore, whether Congress intended those blinded by neurological problems, such as Petitioner's, to receive the same benefits as those blinded by ocular disorders. The answer to this question is of great importance to all those who are functionally blind but who are not "specially" insured for social security disability purposes.

The court of appeals, as is proper, considered not only the language of the statute but also its legislative history. Train v. Colorado Public Interest Research

Group, 426 U.S. 1, 9-10, 96 S. Ct. 1938, 1942 (1976). The special blindness disability category was amended to its current form in 1968. Public Law 90-248 (1968). At that time, Congress established automatic disability, regardless of ability to work, for those claimants with visual acuity of 20/200 or less in the better eye with correction.

The committee reports underlying the 1968 amendment demonstrate that Congress took a functional approach to the definition of blindness:

In order to qualify for benefits, a person would have to have vision of 20/200 or less rather than 5/200 as in present law.

1967 U.S. Code Cong. & Admin. News 2834, 2842 (emphasis added). The committee's reference to "vision of 20/200" or less shows that the focus was not simply on

ocular power but rather on the total visual function, which must include the ability of the brain to make use of visual signals from the eyes. Further, the committee reports later refer to "industrial blindness". Id at 2886. Once again, the reference is to the ability to see, not to the condition of one's eyes alone.

The legislative history notes specifically that the definition of blindness used in the statute "is the definition in the Internal Revenue Code and is used by a number of governmental and private agencies". 1967 US Code Cong. & Admin. News, 2834, 2886. The Internal Revenue Code definition was found in 1967 in former § 151 of the Internal Revenue Code (26 USC § 151(d)(3)) and was identical to the definition of blindness at issue in this case. When Congress referred specifically

to the Internal Revenue definition of blindness, it was presumed to be aware of any judicial constructions of that definition:

Congress is deemed to know the ... judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning.

Blitz v. Donovan, 740 F2d 1241, 1245 (DC Cir. 1984), quoting Florida National Guard v. FLRA, 699 F2d 1082, 1087 (11th Cir.) cert. denied 104 S. Ct. 524 (1983).

Thus, when Congress referred to the Internal Revenue definition of blindness, it was adopting the Tax Court construction in 1962 of the blindness definition in Hollman v. Commissioner, 38 TC 251 (1962). The tax court in Hollman held a taxpayer was within the definition of "blindness" where his vision could be corrected to better than

20/200, but the lenses required to correct his vision could practically be worn only for brief periods. Thus, Hollman's vision "with correcting lenses" was better than 20/200, and he did not meet the strict statutory definition. However, because the correcting lenses caused problems, he did not as a practical matter have functional vision better than 20/200 and was entitled to a determination that he was "blind" under the statute. He did not technically meet the statutory definition, but functionally he did. Similar reasoning should be applied in this case.

The court of appeals referred in a footnote to the Internal Revenue statute and the Hollman decision. The court agreed that "the holding in Hollman supports [petitioner's] functional blindness interpretation generally". 827 F2d at 929

n.2. However, without further explanation, the court found this construction of the statutory blindness language "not sufficient to provide a clear insight into legislative intent." The court of appeals erred.

There is nothing in the legislative history of the statute to indicate that Congress sought to distinguish between those blinded by loss of visual acuity and those blinded by neurological disorders. The Secretary has referred to no judicial or other constructions of any definition of blindness which supports the court of appeals narrow reading. All the discussions in the committee reports refer to the need for a special rule for those who are vocationally impaired by their inability to see. 1967 US Code Cong. & Admin. News 2834, 2842, 2886. The only specific reference to any similar definition is to the Internal

Revenue definition, and that definition had been construed five years earlier by the Tax Court. If Congress is deemed to know what the law is, then it must now be considered to have intended to adopt that Tax Court construction of the definition of blindness. See Cannon v. University of Chicago, 441 US 677, 696-97, 99 S.Ct. 1946, 1957-58 (1979). Blitz v. Donovan, *supra*.

This is not a matter in which the Secretary has brought to bear any expertise to which the judicial branch should defer. The Secretary's regulation defining blindness does nothing to interpret the statute; it simply repeats it. 42 U.S.C. Section 416(i)(1)(B); 20 CFR Section 404.1581. The court of appeals recognized this but deferred to the Secretary's "position in this litigation". 872 F2d at 929. However, there is nothing about the

Secretary's position in this litigation which demonstrates the application of any expertise. The Secretary has submitted no facts, rules or regulations which show any reasoning peculiar to the Agency. The Secretary simply argues rules of statutory construction.

Finally, the court of appeals refers to the Secretary's Program Operations Manual System (POMS), Section 26005.001 B (Secretary's Brief in Court of Appeals at 22):

For a claimant who is fully insured for blindness only, the only issue is the one involving the legal definition of blindness, even though the applicant may be severely disabled, visually or otherwise. The fully insured provision applies only to statutory blindness, and it is not necessary to evaluate the applicant's impairment beyond this point. In other words, the claimant either meets the legal definition of blindness or does not, and if not, then it is because the condition is not so severe as to meet the definition of statutory

blindness, and a denial (lack of severity) is appropriate.

First, as above, this statement involves no explanation or application of expertise. It simply takes a narrow position on construction of the statute.

Second, it is not entirely clear from the language of the POMS that a visual impairment of a severity equal to or worse than that described in the statute would not come within the Secretary's construction. In other words, the evidence is undisputed in this case that the Petitioner's visual dysfunction is every bit as severe as the dysfunction described in the statute. If "severity" is the question, Petitioner is indeed disabled by blindness within the meaning of the law. The POMS relied on by the Secretary is, therefore, inconsistent with the Secretary's position in this case.

CONCLUSION

In this case of first impression, the Secretary of Health and Human Services has narrowly construed the blindness disability statute so as to deprive of disability benefits those whom Congress intended should have them - those who cannot see to work for neurological rather than ocular reasons. This is an important question of interpretation of federal law which affects a large class of visually disabled workers. The petition for certiorari should be granted and the decision of the court of appeals reversed.

Respectfully submitted,

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APPENDIX TO

Petition for Writ of Certiorari to the
United States Court of Appeals for
the Ninth Circuit

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCRETIA M. ADAMS,)
)
Plaintiff-Appellant)
)
v.)
)
OTIS R. BOWEN, Secretary of)
Health and Human Services,)
)
Defendant-Appellee.)

No. 88-3743
D.C. No. CV-87-750-MA

OPINION

Appeal from the United States District
Court for the District of Oregon
Malcolm F. Marsh, District Judge
Presiding

Argued and Submitted
March 7, 1989 - Portland, Oregon

Filed April 19, 1989

Before: William C. Canby, Jr., David R.
Thompson and Edward Leavy, Circuit Judges

Lucretia Adams appeals from the district
court's decision upholding the determination
of the Secretary of Health and Human

Services (the Secretary) that Adams is not entitled to social security disability benefits. The Secretary's decision to deny benefits "'will be disturbed only if it is not supported by substantial evidence or it is based on legal error.'" Browner v. Secretary of Health & Human Servs., 839 F.2d 432, 433 (9th Cir. 1988) (quoting Green v. Heckler, 803 F.2d 528, 529 (9th Cir. 1986). See 42 U.S.C. §405(g) (1982). We review the district court's conclusion de novo. Gamer v. Secretary of Health & Human Servs., 815 F.2d 1275, 1278 (9th Cir. 1987).

BACKGROUND

The relevant facts are undisputed. Adams, a 56-year-old diabetic with impaired vision, has 32 quarters of coverage since 1980 and is "fully" insured under the requirements of 20 C.F.R. §404.130(1988). However, Adams does not have 20 quarters of

coverage in the 40-quarter period ending with the quarter of alleged disability; therefore, she is not "specially" insured. Because Adams is "fully," but not "specially" insured, she must be statutorily blind in order to be eligible for disability benefits based upon her visual deficiency. 20 C.F.R. §404.130(e). The statute defines blindness as follows:

[T]he term "blindness" means central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which is accompanied by a limitation in the fields of vision such that the widest diameter of visual field subtends an angle no greater than 20 degrees shall be considered for purposes of this paragraph as having a central visual acuity of 20/200 or less

42 U.S.C. §416(i)(1)(B) (Supp. IV 1986).¹

¹ The language of the corresponding regulation simply tracks the statute:

We will consider you blind under the law for a period of disability and for payment of disability insurance benefits if we determine that you are statutorily blind. Statutory blindness is defined in the law

In December of 1980, Adams suffered a heart attack. During coronary bypass surgery several months later, Adams had a stroke leaving her totally blind with partial left-sided paralysis. Adams has recovered, largely successfully, from the effects of the stroke. She is no longer completely blind and has regained full use of all but her left hand.

Adams continues to suffer, however, from a neurological impairment affecting the "central processing of visual information." Although she has intact visual fields, and her visual acuity in each eye is

as central visual acuity of 20/200 or less...in the better eye with the use of correcting lens. An eye which has a limitation in the field of vision so that the widest diameter of the visual field subtends an angle no greater than 20 degrees is considered to have a central visual acuity of 20/200 or less. 20 C.F.R. §404.1581(1988).

approximately 20/50, Adams has difficulty processing visual information when the environment around her is moving. She cannot see well enough to put a staple in the corner of a piece of paper and must avoid brick sidewalks and escalators, which make her nauseous. She trips and falls while walking. The consulting neuropsychologist described her condition as follows:

While her visual acuity may well be relatively intact, her ability to perceive and use that visual information in an efficient manner is highly compromised. She is severely impaired on all tasks involving visual scanning and visual planning and organization. In this regard, while she is not blind in the sense of having lost the sensation of vision, she is in many ways worse off than someone who is blind. That is because of her difficulty with visuoprattic function and her ability to use efficiently what information is available to her. At this time, she is vocationally disabled because of this lack of visual efficiency.

The Administrative Law Judge (ALJ) noted

that three ophthalmologic specialists, including Adams' treating physician, agree that she is "functionally blind."

Despite Adams' functional blindness, the ALJ rejected her disability claim, reasoning that Adams does not strictly satisfy the highly specific statutory definition of blindness. The ALJ noted that Adams is clearly "visually disfunctional" and "would be found disabled if she were specially insured instead of only fully insured." The Appeals Council denied Adams' request for review of the ALJ's decision.

DISCUSSION

Adams contends that, although 42 U.S.C. §416(i)(1)(B) sets forth a specific definition of blindness for purposes of determining entitlement to disability benefits, "Congress cannot have intended that disability benefits be awarded to those

who are effectively blind because of damage to their eyes while denying benefits to those who suffer the same impairment because of damage to the brain." In essence, Adams advocates the use of an equivalency requirement for the condition of blindness described in the statute. The Secretary, on the other hand, argues that there is nothing in the language of the statute or the legislative history "suggesting that Congress intended the Secretary to apply any standard other than the strict definition in the statute." Furthermore, the Secretary contends that the agency's interpretation of the statute and the implementing regulation are entitled to great deference. This is a case of first impression.

The basic rules of statutory construction are long-standing and well-settled:

"In construing a statute in a case of first impression, we look to the

traditional signposts of statutory construction: first, the language of the statute itself; second, its legislative history, and as an aid in interpreting Congress' intent, the interpretation given to it by its administering agency."

Funbus Systems, Inc. v. California Pub. Util. Comm'n, 801 F.2d 1120, 1125-26 (9th Cir. 1986) (citation omitted). See Washington State Dep't of Game v. I.C.C., 829 F.2d 877, 879 (9th Cir. 1987). 42 U.S.C. §416(i)(1)(B) presents a clear definition of what blindness 'means.' "As a rule, '[a] definition which declares what a term 'means'...excludes any meaning that is not stated.'" Colautti v. Franklin, 439 U.S. 389, 392-93 n. 10 (1979) (quoting 2A C. Sands, Statutes and Statutory Construction, §47.07 (4th ed. Supp. 1978)). See, e.g., John-Manville Corp. v. United States, 855 F.2d 1556, 1559 (Fed. Cir. 1988), cert. denied, U.S., 109 S.Ct. 1342 (1989); Leber

v. Pennsylvania Dep't of Env'tl. Resources, 780 F.2d 372, 376 (3d Cir.), cert. denied, 478 U.S. 1004 (1986). Because of language of the statute is clear, the definition of blindness should be read and applied literally.

[1] Nothing in the legislative history of the Social Security Amendments of 1967, including Section 416(i)(1)(B), suggests that Congress intended anything but a narrow reading of the statute's unambiguous language. See Escobar Ruiz v. INS, 838 F.2d 1020, 1023 (9th Cir. 1988) (en banc) (even if a statute is plain and unambiguous, courts may look to see if there is clearly expressed legislative intent contrary to the language); California v. Kleppe, 604 F.2d 1187, 1194 (9th Cir. 1979) ("'[E]ven the most basic general principles of statutory construction must yield to clear contrary

evidence of legislative intent.'") (quoting National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458 (1974)). The Senate Report states only that "[i]n order to qualify for benefits a person would have to have vision of 20/200 or less." See 1967 U.S. Code Cong. & Adm. News 2834, 2842, 2886-87. Although the statute purposely "liberalized" the previous definition of blindness "[i]n recognition of the economic hardships faced by blind persons." id. at 2886, 3200, there is no indication that the equivalency requirement urged by Adams was intended or even contemplated by Congress.²

² The Senate Report does note that "[t]his definition is the definition of blindness is the definition in the Internal Revenue Code and is used by a number of governmental and private agencies." 1967 U.S. Code Cong. & Admin. News 2886. See I.R.C. §151(d)(3)(1982) (repealed in 1986; preceded by I.R.C. § 25(b)(1)(C)(iii)(1948) and I.R.C. § 25(y)(1944)). Prior

[2] Finally, the rules of statutory construction require us to consider the Secretary's interpretation of the statute. "The interpretation of statutes and regulations by an agency charged with their administration is entitled to due deference and should be accepted unless demonstrably

interpretations of Section 151(d)(3) or its predecessors might therefore be indicative of congressional intent because "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law..." Cannon v. University of Chicago, 441 U.S. 677, 696-97 (1979). See also Goodyear Atomic Corp. v. Miller, ___ U.S. ___, 108 S.Ct. 1704, 1711-12 (1988); Blitz v. Donovan, 740 F.2d 1241, 1245 (D.C. Cir. 1984).

However, the only case dealing with the application of Section 151(d)(3) or its predecessors to a visual impairment not meeting the strict statutory definition appears to be Hollman v. Commissioner, 38 T.C. 251 (1962). Although the holding in Hollman supports Adams' functional blindness interpretation generally, id. at 258, 262, it is not sufficient to provide a clear insight into legislative intent.

irrational or clearly contrary to the plain meaning." Nevitt v. United States, 828 F.2d 1405, 1407-07 (9th Cir. 1987) (citing Udall v. Tallman, 380 U.S. 1 (1965)). See also Gardebring v. Jenkins, __ U.S. __, 108 S.Ct. 1306, 1314 (1988) (deference to Secretary's reading of agency's regulation). While, as Adams points out, this is not a case in which the Secretary has issued an interpretative regulation, we can evaluate the Secretary's interpretation as demonstrated by his position in this litigation and Section 26005.001 of the Secretary's Program Operations Manual System dealing with statutory blindness. The Secretary clearly interprets the statute to require a strict application of the statutory definition.

The Secretary's decision is supported by substantial evidence and is based on the

14a

application of a correct legal standard.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LUCRETIA M. ADAMS,)
)
 Plaintiff,)
)
 v.)
)
 OTIS R. BOWEN, Secretary of)
 Health and Human Services,)
)
 Defendant.)

No. 87-750 MA

OPINION

MARSH, Judge

Plaintiff brings this action pursuant to 42 U.S.C. § 405(g)(1982) of the Social Security Act (hereinafter "Act") for judicial review of a final decision of the Secretary of Health and Human Services (hereinafter "Secretary"). Plaintiff was denied disability insurance benefits. For the reasons that follow, I affirm the decision of the Secretary.

ADMINISTRATIVE PROCEEDINGS

Lucretia M. Adams applied for disability and disability insurance benefits on January 9, 1986. Her application was denied both initially and upon reconsideration. After a timely request for a hearing, plaintiff requested that a decision be made on the existing record without an oral hearing.

On February 17, 1987 the ALJ found plaintiff was not disabled within the meaning of the Act and was not entitled to disability benefits. This decision became final when the Appeals Council declined to review. Plaintiff appeals and claims she is functionally blind and thus entitled to disability benefits. Specifically, plaintiff contends that the Secretary should apply a functional definition of blindness under Rule IV.

FACTS

The facts in this case are not in dispute. Plaintiff is a 58 year old woman who suffered a heart attack in December, 1980. Plaintiff claims disability from blindness following a cerebral event during coronary bypass surgery in February, 1981. While some of her visual capacity has returned, she is still limited visually. Plaintiff's visual acuity is 20/50 in both eyes, however, she is neurologically unable to process visual information. For example, plaintiff cannot see sufficiently well to put a staple in the corner of a piece of paper. Plaintiff trips and falls because she cannot see the ground ahead of her as she walks. Plaintiff avoids brick sidewalks and escalators because she becomes nauseous when she encounters them.

DISCUSSION

The standard on review is whether the

decision of the Secretary is supported by substantial evidence. 42 U.S.C. § 405(g) (1982); Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951); Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971). It is more than a scintilla but less than a preponderance. Sorenson v. Weinberger, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). The substantial evidence standard requires that the evidence as a whole be reviewed and not just the evidence which supports the Secretary's decision. Embry v. Secretary, 626 F.2d 83, 94 (9th Cir. 1980). The Secretary's determination may be set aside if the proper legal standards were not applied in weighing the

evidence and in making the decision even if the evidence is substantial. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984); Kail v. Heckler, 722 F.2d at 1497.

Rule IV of the Social Security Administration regulations provides disability insurance benefits for individuals determined to be statutorily blind and who are fully insured. 20 C.F.R. § 404.130(e). The parties agree that plaintiff is fully insured.¹ The parties dispute the definition of statutory blindness.

Congress has given the Secretary power to promulgate regulations to effectuate the provisions of the Social Security Act. 41 U.S.C. § 405(a). 42 U.S.C. § 416(i)(1)

¹ The parties also agree that plaintiff does not meet the 20/40 requirement and thus does not qualify for benefits under another Rule. 20 C.F.R. § 404.130(b)

provides disability benefits for blindness. Regulations have been promulgated implementing this section. 20 C.F.R. §§ 404.130, 404.1581-7. Rule IV provides that blindness is defined at 20 C.F.R. § 404.1581. 20 C.F.R. § 404.130(e). 20 C.F.R. § 404.1581 defines statutory blindness as:

central visual acuity of 20/200 or less in the better eye with the use of correcting lens. An eye which has a limitation in the field of vision so that the widest diameter of the visual field subtends an angle no greater than 20 degrees is considered to have a central acuity of 20/200 or less.

Plaintiff argues that she is functionally blind because of her neurological inability to process visual information. She argues that Congress did not intend to award disability benefits to those who are blind because of the damage directly to their eyes and to deny benefits to those who are

functionally blind because of damage to their neurological system or brain. She cites legislative history contending that Congress was taking a functional approach to blindness in using words such as "vision," "industrial blindness" and "visual acuity." Finally, plaintiff argues that Congress intended the definition of statutory blindness to be the same as that used by other agencies. Accordingly, plaintiff cites a Tax Court opinion finding that a functionally blind taxpayer fell within the statutory definition. Hollman v. Commissioner, 38 T.C. 351 (1962).

The Secretary was granted power to promulgate regulations implementing the Social Security Act. 42 U.S.C. § 405(a). Courts must defer to the expertise of the agency where the agency has been charged with interpretation of the statute and the

agency has not exceeded statutory authority nor acted in an arbitrary and capricious manner. Udall v. Tallman, 380 U.S. 1, 16 (1965) rehearing denied, 380 U.S. 989; Good Samaritan Hospital, Corvallis v. Mathews, 609 F.2d 949, 955 (9th Cir. 1979).

I have reviewed the statutory scheme and its regulations. I do not find that the regulations defining statutory blindness exceeded statutory authority or are arbitrary and capricious. I find that the statute and regulations provide disability benefits to persons who are statutorily blind and have limited work histories if the person qualifies under the definition of blindness. I find no authority demonstrating that Congress intended the Secretary to consider other impairments in combination with blindness in statutory blindness cases.

The regulations are divided into subparts. Subpart P considers determination of disability and blindness. 20 C.F.R. 404 Subpart P. This subpart contains a definitional section which specifies that "there are different rules for determining disability for individuals who are statutorily blind." 20 C.F.R. § 404.1505(b). The section goes on to state that these rules are contained in §§ 404.1581 through 404.1587. Id. Sections 404.1581 through 7 do not reference to any other disability sections or definitions used by other agencies and instead provide separate rules for statutory disability determinations, evaluations, benefits, trial work periods and suspension of benefits. Unfortunately, this plaintiff does not fall under the statutory definition of blindness and thus benefits are not available to her.

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Plaintiff's claim is denied.

DATED this 21 day of March, 1988.

Malcolm F. Marsh
United States
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

LUCRETIA M. ADAMS,)
)
Plaintiff,)
)
v.)
)
OTIS R. BOWEN, Secretary of)
Health & Human Services,)
)
Defendant.)

No. 87-750 MA

ORDER

MARSH, Judge.

The decision of the Secretary is affirmed. Plaintiff's claim for relief is denied.

IT IS SO ORDERED.

DATED this 21 day of March, 1988.

Malcolm F. Marsh
United States
District Judge

APPENDIX C

June 24, 1987

ACTION OF APPEALS COUNCIL ON REQUEST FOR
REVIEW

The request for review of the Administrative Law Judge's decision in your case has been considered.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) There is an error of law; (3) The Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. (These provisions are contained in 20 CFR 404.970 for Social Security claims under Title II of the Social Security Act

and in 20 CFR 416.1470 for supplemental security income claims under Title XVI of the Act.)

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Secretary in your case.

In reaching this conclusion, the Appeals Council carefully considered your attorney's contentions dated April 24, 1987. The Council concluded, however, that the Administrative Law Judge's findings and conclusions with regard to your visual problems were in accordance with Section 404.1581 of Regulations No. 4. Therefore, the contentions do not provide a basis for changing the Administrative Law Judge's

decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing the contrary is made. The complaint should name the Secretary of Health and Human Services as the defendant and should include the Social Security number(s) shown at the top of this notice. The right to court review is provided for in section 205(g) of the Social Security Act, as amended (42 U.S.C. 405(g)) for claims under Title II and in section 1631(c)(3) of the Act (42 U.S.C. 1383(c)(3))

for claims under Title XVI.

If a civil action is commenced, the Secretary must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel of the Department of Health and Human Services at 200 Independence Avenue, S.W., Washington, D.C. 20201. (See Rules 4(c)(2) and (d)(4) and (5) of the Federal Rules of Civil Procedure and Part 45, Section 4.1 of the Code of Federal Regulations.) In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

Margaret W. Tryon
Member, Appeals
Council

APPENDIX D

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

ON-THE-RECORD

IN THE CASE OF:Lucretia M. Adams

(Claimant)

CLAIM FOR:Period of Disability
Disability Insurance
Disability250-54-1198

(Social Security #)

This case is before the Administrative Law Judge on a request for hearing. The claimant waived the right to appear personally and requested that a decision be made based on the evidence of record. The Administrative Law Judge has carefully considered all the documents identified in the record as exhibits.

ISSUES

The general issues are whether the

claimant is entitled to a period of disability and disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status requirements of the Act are met for the purpose of entitlement. An additional issue presented in this case is whether the claimant meets the definition of statutory blindness.

APPLICABLE REGULATIONS

An individual will be considered blind under the law for a period of disability and for payment of disability insurance benefits if she is at least fully insured and it is determined that she is statutorily blind. Statutory blindness is defined in the law as central visual acuity of 20/200 or less in the better eye with the use of a correcting lens. An eye which has a limitation in the field of vision so that the widest diameter of the visual field subtends an angle of no greater than 20 degrees is considered to have a central visual acuity of 20/200 or less. An individual's blindness must have lasted or be expected to last for a continuous period of at least 12 months (20 CFR 404.1509 and 404.1581).

Regulations promulgated by the Secretary

at 20 CFR 404.130 provide specific rules for determining whether an individual meets the insured status requirements for purposes of disability. Rule I provides that individual must meet the 20/40 requirement. This requirement is met if the individual is both fully insured and has at least 20 quarters of coverage in the 40 quarter period ending with the quarter of alleged disability. Rule II pertains to an individual who becomes disabled prior to age 31. Rule III pertains to an individual who had a period of disability established prior to age 31, and Rule IV provides for the situation where an individual is statutorily blind. This rule requires an individual be insured in the quarter of alleged disability, be disabled by blindness solely as defined in section 404.1581, and be fully insured. The definition of blindness in 404.1581 is the

same as the definition of blindness in section 216(i)(1)(B) of the Act.

SUMMARY AND EVALUATION OF THE EVIDENCE

This case involves a 55-year old woman who alleges she has been disabled since February 4, 1981, due to statutory blindness. According to her earnings record (Exhibit 7) she is fully insured under the requirements specified at 20 CFR 404.130, in that she requires 27 quarters of coverage and has 32 quarters in the period since 1950. She does not, however, meet the 20/40 requirement as there is no 40 quarter period in which she has 20 covered quarters. She has 16 covered quarters between 1978 and the last quarter of 1981 but her record establishes no other quarters of coverage in the 40 quarter period which would extend through 1981. Since she does not meet the special insured requirements for disability,

she can be entitled to disability only if she can establish that she is fully insured and statutorily blind as provided in the above-cited Rule IV (20 CFR 404.130(e)). Therefore, as she is fully, although not specially, insured the only issue presented in this appeal is whether she meets the strict standards for statutory blindness.

The medical evidence shows the claimant does have a complex medical condition resulting from a myocardial infarction and a stroke suffered in November 1980. Medical reports including hospital admissions shown in Exhibits 16 through 24 document residuals including bilateral hemiparesis and cortical blindness. The blindness is due to an ischemic optic nerve injury due to retina artery occlusion. This has resulted in impairment of central processing of visual information which leaves her functionally

blind. However, mechanically her vision has not been impaired to the extent specified in the Secretary's regulations for determining blindness. This has been documented by numerous medical reports which measure her visual abilities. These reports include Exhibits 25, 30, 31, 32, 34, 38, 39 and 40. Essentially, she has intact visual fields and visual acuity measured at 20/50 in each eye. She does have a central scotoma in each eye and some limitations of visual field but her total visual efficiency has been measured at 57 percent (Exhibit 34). This degree of impairment does not meet the standards for statutory blindness as defined above.

The conclusion that the claimant does not meet the statutory blindness requirements has been shared by a variety of specialists who have evaluated the evidence in this

case. Specialists include physicians at the Disability Determination Services (Exhibit 34) as well as the claimant's own treating sources. For example, Exhibits 42, 43, and 44 include evaluations by W. B. Smith, M.D., Charles spray, M.D., and William T. Shultz, M.D., all of whom are specialists in various areas of ophthalmology. All have agreed that although she has functional blindness she does not meet the standards for blindness specified in section 216(i)(1)(B) of the Act and promulgated by the Social Security Administration in section 404.1581 of Regulations No. 4.

Every effort has been made to develop the case to permit the claim to establish that she does meet the test for statutory blindness. However, the extensive medical reports simply do not establish the type of impairment specified under the requirements

of the statutory law and the regulations. It is clear from the overall evidence that the claimant is visually dysfunctional and may be "disabled" under the general definition of disability. However, since she is not insured for ordinary disability purposes, this definition does not apply to her. This being the case, there is no alternative to a finding that she does not meet the highly specific disability requirements for statutory blindness and is not entitled to benefits for which she applied on January 9, 1986, although she would be found disabled if she were specially insured instead of only fully insured.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following findings:

1. The claimant has not met the special earnings requirements of the Act as of the date she alleges disability or at any other time.
2. The claimant is fully insured for disability purposes with 32 covered quarters since 1950.
3. The claimant has not engaged in substantial gainful activity since February 4, 1981, the date she alleges she became disabled.
4. The claimant has the following impairments: anoxic encephalopathy with residual visual disturbance; clumsiness of the left hand and left foot; diabetes mellitus; and, hypertension.
5. The degree of severity of the claimant's visual impairment does not meet the definition of statutory blindness as found under sections 2.02, 2.03A, or 2.03B of the Listing of impairments at Appendix 1, Subpart P, or section 404.1581 of Regulations No. 4.
6. The claimant was not under a "disability" as defined at section 216(i)(1)(B), 20 CFR 404.130(e), and 404.1581 at any time through the date of this decision.

DECISION

It is the decision of the Administrative

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Law Judge that based on the application filed on January 9, 1986, the claimant is not entitled to a period of disability or to disability insurance benefits under sections 216(i) and 223 respectively of the Social Security Act.

Thomas N. Trotta

February 27, 1987

Date

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

LUCRETIA M. ADAMS,)
)
Petitioner,)
)
v.)
)
OTIS R. BOWEN, Secretary of)
Health & Human Services,)
)
Respondent.)

CERTIFICATE OF FILING

I, James S. Coon, being first duly sworn,
depose and say that I am one of attorneys
for petitioner herein. That I filed the
above PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE NINTH CIRCUIT
with the Clerk of the Supreme Court of the
United States on the _____ day of July,
1989, that it was placed in an envelope
properly addressed with prepaid postage
thereon and deposited in the United States

Post Office at Portland, Oregon.

James S. Coon

SUBSCRIBED and SWORN to before me this
____ day of July, 1989.

NOTARY PUBLIC FOR OREGON
My Commission Expires:

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT on:

Solicitor General
Department of Justice
Washington, DC 20530

Gary J. Thogersen
Special Assistant
United States Attorney
2901 SW Third, MS 509
Seattle, WA 98121

this _____ day of July, 1989, by mailing to each three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in sealed envelopes addressed to said individuals at their regular office addresses; said sealed envelopes were then deposited in the United States post office at Portland, Oregon on the day last above mentioned with the postage thereon fully paid.

James S. Coon
Attorney for Claimant